

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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: 06-MD-01775 (JG)

IN RE:

: United States Courthouse
: Brooklyn, New York

AIR CARGO SHIPPING
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LITIGATION

: September 27, 2011
: 3:00 p.m.

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TRANSCRIPT OF CRIMINAL CAUSE FOR MOTION HEARING
BEFORE THE HONORABLE VIKTOR V. POHORELSKY
UNITED STATES MAGISTRATE JUDGE

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1 (In open court.)

2 COURTROOM DEPUTY: All rise.

3 (Magistrate Judge Pohorelsky takes the bench.)

4 THE COURT: Good afternoon. Please be seated.

5 THE CLERK: Civil cause for a hearing in 06-MD-1775,

6 In Re Air Cargo Shipping Services Antitrust Litigation. The

7 Honorable Victor Pohorelsky presiding.

8 THE COURT: All right. We have the two motions. I
9 think that was all that's on the calendar, the two motions
10 regarding Nippon Airways.

11 MR. SEDRAN: Correct, the two brought by plaintiffs
12 against Nippon Cargo.

13 THE COURT: Correct. Nippon Cargo, sorry.

14 Well, let me take up the issue concerning the
15 assertion of privilege which I had already ruled on in
16 connection with, I think, some other airline. It was Korean
17 Air, I believe. I'm kind of hard-pressed not to follow that
18 precedent; am I not?

19 Well, you might think I shouldn't, but is there
20 anything that differentiates this situation from the situation
21 with Korean Air?

22 MR. SEDRAN: Howard Sedran, your Honor, for the
23 plaintiffs.

24 We think the answer is yes. Otherwise, we wouldn't
25 take the Court's time to have this argument.

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1 In connection with the motion against Korean Air, as
2 I understand the Court's ruling, you said, and I'm quoting
3 from page 74 of that transcript: "I'm not sure he" -
4 referring to Mr. Morrow, KE's lawyer - "he knows how to solve
5 your difficulties, but there's going to have to be another way
6 and it's not by having them respond to a 30(b)(6) notice where
7 they have to produce a witness to explain what it was that the
8 Government was talking about, the anticompetitive behavior
9 here." I mean, you said, your Honor, "I understand your
10 problem, but that's not the way to pursue it."

11 So, I'm here to tell you that in connection with our
12 motion against Nippon Cargo, we're not asking Mr. Fornaciari,
13 who represents Nippon Cargo, to educate his witness about his
14 thought processes about why it was that they, Nippon Cargo,
15 pled guilty. So that's my reading of what you ruled, but you
16 did seem to say there might be another way to go about it.

17 THE COURT: I'm not sure I remember what the "it"
18 is, but maybe you'll help me.

19 MR. SEDRAN: Well, it's to try to get testimony from
20 the witnesses concerning a guilty plea.

21 So, the notice of deposition served on Nippon Cargo
22 is somewhat different than the notice served on Korean Air.
23 If you recall, the notice served on Korean Air asked for
24 information about the dates and parties and substance of
25 communications, and then incorporated the plea agreement and

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1 made reference to the fact that the Government said "if we
2 went to trial, we would have provided evidence to show that
3 there were meetings, communications and agreements."

4 Our notice of deposition on page five, and our
5 notice is Exhibit B to our motion, we're asking for Nippon
6 Cargo to identify the high-level personnel of Nippon Cargo
7 that was referred to in the plea agreement, other employees of
8 Nippon Cargo that were referred to in the plea agreement, the
9 other Air Cargo providers that supposedly conspired with
10 Nippon Cargo, and what was actually said.

11 In our factual situation, your Honor, in the Answers
12 to Interrogatories, Nippon Cargo never identified any
13 agreements that they entered into. At best, they identified
14 meetings and communications with competitors.

15 THE COURT: I'm sorry, you said they never
16 identified what?

17 MR. SEDRAN: They never identified any agreements
18 that they entered into with competitors. They've only
19 identified meetings and communications.

20 Our view, your Honor, is that when a company enters
21 a guilty plea and says on the record that in fact they did
22 what they were charged with, they admit that there were
23 agreements, and in our brief, Exhibit F I think it is, during
24 Nippon Cargo's guilty plea, the criminal court said: "Is that
25 factual summary true and correct?" Nippon Cargo said: "Yes,

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1 it is." Then the Court said: "Did Nippon, in fact, do what
2 the Government has stated it could prove at trial?" The
3 answer is: "Yes."

4 So, when a company comes in and says "yes, we did,
5 we conspired, we agreed," I want to suggest to the Court that
6 it's fair game for the plaintiffs to ask "okay, what is it
7 that you did, what is it that you agreed to, and who were the
8 participants?"

9 I don't want Mr. Fornaciari to have to go through
10 all of his meetings with the Department of Justice and give me
11 the underlying factual basis for the decision to plea, but I
12 do think we're entitled to have a witness, a corporate
13 representative under oath, this will be a videotaped
14 deposition, be asked questions.

15 Okay. Nippon Cargo said that it did these things,
16 it agreed, it conspired. "What is it that you did?" Now,
17 the answer may be, "We didn't do anything. We didn't
18 conspire. We didn't agree." If that's the position that they
19 want to take at trial, I think they might look silly in light
20 of the fact in court they agreed that they did it.

21 I want to suggest, your Honor, however, it's not
22 proper for a privilege objection to be lodged to preclude us
23 from getting the answer. I am certain, based on all the
24 evidence that we know, that Nippon Cargo knows what it did, it
25 knows that it agreed with others, but if it's their position

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1 that "we really didn't agree, that we stepped into court, we
2 pled guilty, but that wasn't the truth," well, let them state
3 that on the record and not be shielded by a privilege
4 objection.

5 Another point I'd like to make is --

6 THE COURT: Are you asking them to make another
7 admission that is the same as the admission they made on the
8 record in making the guilty plea?

9 MR. SEDRAN: No, it's far --

10 THE COURT: You want more specificity?

11 MR. SEDRAN: I do want more specificity. I have
12 trouble with that word. And I think we're entitled to it to
13 the extent that it is information known by the company as to
14 what it did and who they spoke to. It's either they have the
15 knowledge or they don't have the knowledge and tell us.

16 Now, if I could just address the Eli Lilly case
17 because that you, in large part, base your opinion on Eli
18 Lilly. But Eli Lilly, what I'm going to say, your Honor, is
19 Eli Lilly could stand and you could still find in our favor
20 for these reasons.

21 In Eli Lilly, the facts were extremely important.
22 It wasn't just a rule of law that applies to every single case
23 no matter what. In the Eli Lilly case, Eli Lilly pled guilty
24 to promoting Zyprexa, a drug, and they were misbranding it.
25 It wasn't a conspiracy case and there was only one product.

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1 The guilty plea was for a period of time that predated the
2 civil case period of time.

3 In that case, we checked the docket, the plaintiff,
4 the State of West Virginia, took seventy depositions, and the
5 court, Magistrate Mann, said that the State has not explained
6 the added value of a 30(b)(6) deposition.

7 Here, we don't know, we've never had Answers to
8 Interrogatories identifying the agreements. We're entitled to
9 know who Nippon Cargo conspired with. We still don't know who
10 are the key people with Nippon Cargo that engaged in unlawful
11 acts.

12 In the Zyprexa case, the guilty plea agreement
13 specifically stated what Eli Lilly did wrong, that they
14 mismarketed their product for uses for dementia that were
15 approved. So there was sufficient information for the
16 plaintiffs to have all they needed to know from the guilty
17 plea.

18 Here, we have deposed three Nippon Cargo witnesses
19 for a total of two days, and we had interpreters so basically
20 half the day is spent waiting for the interpretation. So,
21 unlike the Eli Lilly case where there were seventy
22 depositions, we had four days with an interpreter.

23 So, I think it would be fair for you to rule, your
24 Honor, that Nippon Cargo has to produce a witness to identify
25 agreements that it has entered into with competitors

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1 concerning rates and surcharges, including any agreements that
2 it admitted that it entered into while it was being sentenced
3 on May 8th. Again, if they want to take the position "no, we
4 really didn't enter into agreements, we didn't have
5 communications, we admitted it on the record but we just did
6 it to be done with it."

7 So, for those reasons, I think the factual record is
8 different and there are facts here that were not brought to
9 your attention with respect to the motion against Korean. So
10 I think you could still be faithful to the Eli Lilly opinion
11 and allow us the relief we're requesting.

12 THE COURT: It sounds like what you're saying is
13 that to the extent, because I think Eli Lilly rested, and I
14 haven't read it recently, but rested on the notion that the
15 decision about what it was that was being pleaded to would
16 reveal attorney work product, attorney impressions, attorney
17 views, to the extent that that was communicated to their
18 clients that would be, perhaps, attorney/client privilege, but
19 in any event, essentially what you're saying is that whoever
20 was seeking information in that case, I guess it was the
21 plaintiff, had not satisfied the standard for getting attorney
22 work product. That is, you got to show there's no other way
23 to get the information. There Judge Mann, you were arguing,
24 was saying "well, you got the information, so we don't have to
25 go and tread upon these attorney sensitive matters."

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1 Is that the argument that you're making?

2 MR. SEDRAN: Well, it's close to it, but it's a
3 little bit more because in connection with the motions
4 concerning interrogatories, you have said, ruled, that facts
5 known by attorneys need to be revealed in Answers to
6 Interrogatories, and I would say that in putting up a witness
7 under 30(b)(6), facts known by the company, including the
8 attorneys, need to be presented by the 30(b)(6) witnesses.

9 THE COURT: But facts, if where you're going is it's
10 just a fact, what agreement did they enter into, it's just a
11 fact? Well, in this context, and I don't know exactly if
12 everybody had a handshake and said, "We're going to do this
13 together." It's not typically the way things progress. So
14 you have a much more murky situation. So you don't have
15 somebody saying you can't say that as of such-and-such a date,
16 and I'm not saying this is the case here. I'm just saying
17 hypothetically when you're talking about conspiracies of this
18 nature, of any nature, people talk, exchange some information,
19 and then they go about doing their business and it looks like
20 they're doing business in a conspiratorial way, and maybe they
21 are, but it's not quite, it's not like you have a document
22 that says 'okay, this is what you're going to do, this is what
23 I'm going to do and we're going to all work together.'

24 MR. SEDRAN: I would suggest --

25 THE COURT: Let me just finish.

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1 MR. SEDRAN: I'm sorry.

2 THE COURT: And, so, to the extent that a decision
3 is made to plead guilty, it may well come up in the context of
4 a set of analyses that say well, you know, we're looking at
5 all the meetings here that we know about and all the facts
6 that we know about and looks like the Government would be able
7 to meet their burden of proof in showing that between the
8 conduct that you've engaged in and all of the other meetings
9 that you had with these people that there was an agreement.

10 MR. SEDRAN: And that's not what I'm asking for. It
11 happens to be in this case that there were explicit
12 agreements. Mr. Cohen's going to argue the next motion, and
13 in his papers, we have learned through the discovery we've
14 been able to take, that at various meetings there were express
15 agreements by the parties.

16 So we want Nippon Cargo to tell us at a 30(b)(6),
17 identify the agreements that Nippon Cargo entered into, but if
18 it's a question of Mr. Fornaciari having to do a gestalt
19 process of taking communications and determining whether that
20 rises to the level of agreement, then we're not asking for
21 that. But, to the extent that they know that there were
22 agreements that can't be controverted if they would only tell
23 us and that actually appear in some of the documents, then
24 they ought to have a witness tell us about the agreements that
25 they knew that took place. If it's a matter of Mr.

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1 Fornaciari's interpretation of putting together an e-mail, a
2 piece of correspondence and then reaching his decision that
3 maybe that rises to the level of agreement and perhaps the
4 Government could prove its case, I'm not trying to get that
5 information. I understand that gets inside his mental
6 processes. But we're asking for facts known, we're asking
7 them to identify agreements and participants.

8 The fact that Nippon Cargo came into court and said:
9 "Yes, there were agreements," I think allows us to take a
10 deposition and have Nippon Cargo say: "Yes, we had these
11 three agreements. They were on these routes. Here were the
12 participants." Or, they might say at a deposition: "No, we
13 don't -- as the corporate representative, it's our position
14 that there were no agreements."

15 THE COURT: Okay.

16 MR. SEDRAN: I'm going to say one more thing on Eli
17 Lilly.

18 THE COURT: I'll let you do that. Go ahead.

19 MR. SEDRAN: The last point on Eli Lilly was that
20 the decision by the Court was based upon a lot of factors, not
21 only the possibilities of invading privilege, but the extent
22 of the discovery that had been taken, and it was extensive,
23 and that the fact that that plea agreement gave the plaintiff
24 all it needed to know that Zyprexa was misbranded in its
25 marketing.

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1 THE COURT: Okay. I confess, as I said, that I
2 haven't looked at that case since we last got together. So I
3 may end up having to do that now.

4 Let me ask this question of you, Mr. Sedran.
5 Presumably you've been given the documents that you've asked
6 for. You've received documents from the Justice Department,
7 or that were provided to the Justice Department and perhaps
8 other documents that you got from Nippon Cargo as well.

9 To the extent that those disclose agreements, I
10 presume you've been able to ask about that, or maybe they just
11 don't disclose any agreements as far as setting rates for
12 cargo or --

13 MR. SEDRAN: The answer is Nippon Cargo has produced
14 documents that are produced to the DOJ. One of our problems
15 is, well, there are probably hundreds of thousands of pages of
16 e-mails, a vast majority are in Japanese. So, that we've been
17 working on trying to figure out which ones we should
18 translate, but to go -- we have not translated every single
19 one because it probably would cost us three hundred thousand
20 dollars or more to have full translations, and to the extent
21 that there are agreements that were reached that are not
22 reflected in documents, and I don't know, I would have no
23 access to them. So the easy route is to have Nippon Cargo
24 provide a representative and identify meetings -- I'm sorry,
25 agreements that they know about, rather than have us go

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1 through -- I mean, we're working on it, but in all honesty, we
2 haven't translated all the Japanese documents, and we're
3 entitled to the information in a deposition, and it's probably
4 the speediest way to find out what Nippon Cargo knows.

5 THE COURT: Was your deposition notice on Korean Air
6 the same as the one you served on Nippon Cargo?

7 MR. SEDRAN: It was different in this sense, your
8 Honor. That the deposition notice on Korean Air specifically
9 incorporated the language, I mean verbatim, it didn't
10 incorporate, it set forth the language that "if the Government
11 went to trial, it would have presented sufficient evidence to
12 provide the following facts."

13 One other thought comes to mind, and that is that
14 there are other defendants against whom we would like to take
15 depositions learning information about their agreements. So,
16 rather than retooling a deposition notice, going to the
17 deposition and then having an instruction and then coming to
18 see the Court, it's useful, certainly for our motion against
19 Nippon Cargo, but for the other deposition notices that are
20 queued up, to find out from the Court if in fact there are
21 other ways to get the information, and what I'm suggesting is
22 we don't want to get inside the head of Mr. Fornaciari because
23 there's things in there we probably don't want to know, but to
24 the extent there are facts that don't require filtering and
25 analysis, we think we're entitled to them.

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1 THE COURT: Okay.

2 Mr. Fornaciari? I am assuming you're Mr.
3 Fornaciari.

4 MR. FORNACIARI: That's right, your Honor. I have
5 been for a while.

6 The argument you heard was nothing more than a plea
7 to eradicate the attorney/client privilege, especially in a
8 criminal context, and the reason I say that is because your
9 ruling on September 8th, only a portion of which was read to
10 you, and this opinion that Judge Mann entered in the Eli Lilly
11 case is not so limited. Not at all. And you have it exactly
12 right and you summarized it in the transcript. I'll read to
13 you what you said. You said: "Essentially, Korean Air
14 decided to plead guilty because their lawyers looked at a
15 bunch of evidence and said, you know, the Government has
16 probably got you there so you ought to plead guilty."

17 Now, as you so --

18 THE COURT: I don't know how I would know that. I
19 mean, maybe that's what they argued to me at the time, but I
20 mean, that's often the case. I'm just surmising that's the
21 case.

22 MR. FORNACIARI: But, your Honor, this is not a
23 blue-collar case, not a case of violence. This is a financial
24 crime. This is an antitrust violation. So what happens here
25 is we have Japanese clients. They don't know the difference

1 between a communication with a competitor that is
2 procompetitive or anticompetitive. They're relying on us
3 totally to tell them when is enough evidence to reach the
4 level of chargeable conduct and the risks are too high to go
5 to trial.

6 THE COURT: Okay. And I think Mr. Sedran in his
7 argument is acknowledging that, but he is saying that you said
8 there was an agreement and if there are specific agreements
9 that you learned about from your investigation on behalf of
10 your client and those are facts as opposed to he is making a
11 distinction between analyzing the whole body of evidence and
12 deciding there's enough evidence to convict you versus, you
13 know, an explicit understanding which may have even, in fact,
14 been disclosed in e-mails between the competitors which says
15 we're going to -- as you said, they don't know what's
16 pro-competitive. Maybe they even put in their e-mails "we
17 decided we're going to do this or we're going to do this as
18 part of our joint trade agreement" or whatever. If that's in
19 the documents and it's disclosed in that way, or there's some
20 sort of memorandum from one of your clients to a superior that
21 says "we had this meeting and we decided this, this and this
22 with our competitors," that's a fact as opposed to --

23 MR. FORNACIARI: But, your Honor, he's making an
24 illusory distinction that you're buying into. We're not
25 talking about an agreement. We're talking about a decision by

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1 a lawyer that there's a possible felony.

2 THE COURT: No, there's a distinction, it seems to
3 me. If they say to each other -- you know, I guess the way
4 it's framed here, it's an agreement that's referenced in
5 paragraph four of your plea agreement, that means it's an
6 agreement that violates the law, it does make that leap. I
7 mean, if there's an agreement in there about -- they haven't
8 translated all the e-mails. If there's agreements that your
9 clients reached about specific prices to charge, that's
10 distinguished from, it seems to me, I guess maybe the way it's
11 framed in this notice provides a little bit different color to
12 it.

13 MR. FORNACIARI: But, your Honor, what the Eli Lilly
14 court said and what you adopted on September 8th is exactly
15 what's going on here. What they said here is, and the
16 question in the Eli Lilly case was they wanted to know the
17 precise nature of the misbranding conduct.

18 Here, he's saying "I want to know the precise nature
19 of what you pled to as an agreement."

20 So, what the Court there said was they wanted a Eli
21 Lilly agent most knowledgeable about those matters, and the
22 Court said: "Well, that's going to present a host of
23 attorney/client privilege and work product issues.

24 Knowledgeable witnesses undoubtedly derive their information
25 as or through counsel. Lilly's board of directors, after

1 having been counseled on the company's legal rights and
2 factual basis for the plea, authorized the plea." And that's
3 what happens when there's a plea.

4 Your Honor, please let me make clear we have given
5 them everything that NCA knows about. There's a universe of
6 facts we've given them. He has admitted that we have given
7 him thousands of pages of documents which we gave the Justice
8 Department which constituted the basis for the plea. So, it's
9 not -- now, he has this universe of information that he has at
10 his disposal and what he wants know is to ask our clients
11 "well, out of that universe of information, what did your
12 lawyers believe was so important and so damaging that they
13 counseled you to plead to entering an agreement?" He has the
14 universe of information. He can sift through it. He can
15 decide himself what it is. He can ask the witnesses he's
16 called what it is. But now he wants what we counseled the
17 client to plead to.

18 So, I think what he's asking for, and it's really no
19 argument to say the easy route. It's always the easy route to
20 find out what the damaging evidence is if you can breach the
21 attorney/client privilege. Let's find out what it is. Let's
22 just ask him what his lawyer told him.

23 So, arguing to you that let's take a shortcut, let's
24 take a shortcut and breach the attorney/client privilege is
25 essentially what he's saying. You were right on September

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1 8th, Judge Mann was correct in Eli Lilly, and we are right
2 today when we're telling you that what he wants is privileged
3 information.

4 Your Honor, this is not a small matter. This goes
5 to the very heart of the legal representation of a client in a
6 criminal matter and he wants it.

7 THE COURT: Can't blame him.

8 MR. FORNACIARI: No, I can't blame him either, but
9 he's got it. He doesn't want to do the work to look through
10 all the evidence he's got to find out what it is.

11 THE COURT: This is a little problematic, the way
12 it's phrased here by reference to the plea agreement, but why
13 can't he obtain the information, he didn't want to have to
14 translate all the e-mails, but why shouldn't your client be
15 forced to look through, I understand some of the people who
16 were actually involved, in fact maybe most of the people who
17 were involved in this are no longer employed by your client,
18 but why shouldn't they ask you to have one of the current
19 employees be familiar enough with the e-mail traffic and the
20 other communications to say were any of those disclosed
21 conversations about agreements, or conversations about
22 tariffs, or conversations about prices that will be charged?

23 MR. FORNACIARI: Your Honor, we've identified them
24 for him, your Honor.

25 THE COURT: Specific e-mails? No, I think you've

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1 given him all the e-mails.

2 MR. FORNACIARI: They had a witness, Miss Shingu
3 that you're going to hear about in about ten minutes, whose
4 job was to file approvals on the fuel surcharge in Japan. She
5 spoke for two days about talking to JAL, talking to other
6 airlines about filing for fuel surcharge approvals.

7 So, to the extent we have evidence, it's there.
8 They've questioned witnesses and they've given them responses.
9 It is not our problem that the five or six people who were at
10 the meetings that he is trying to get at are no longer there.
11 They can take their depositions. They're not dead. They're
12 in Japan.

13 THE COURT: Well, they're not exactly readily
14 available either.

15 MR. FORNACIARI: No, but that's what a plaintiff
16 does to prove his case. He finds out who the witnesses are.
17 He doesn't ask a defense lawyer to help him prove his case.
18 He knows who they are. We've identified who they are for him.
19 We've given him the e-mails. Their names are on the e-mails.

20 So, your Honor, Eli Lilly was not as limited as Mr.
21 Sedran would have you believe, and in fact, your Honor, as far
22 as we know, if you ordered us to have a witness testify behind
23 a plea agreement, you'd be the only court that ever did it. I
24 don't see one case in their briefs where they cite to you that
25 this is fair game. We are proceeding on the assumption, the

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1 unsupported assumption by Mr. Sedran, that he's entitled to
2 look behind the plea agreement, and he's not. As Judge Mann
3 said, they have everything that was involved in the plea
4 agreement. They have the plea agreement, they have the
5 sentencing memorandum, they have the hearing on which Judge
6 Bates in Washington --

7 THE COURT: Well, the sentencing memorandum, it
8 provides the Government's view of the evidence. I mean, the
9 sentencing memorandum is just --

10 MR. FORNACIARI: It tells you what the violation is.

11 THE COURT: I know, but are you going to stipulate
12 to the admission of that?

13 MR. FORNACIARI: No, but I'm -- I mean, I'm not
14 going to stipulate it. We're talking about discovery. They
15 have it.

16 THE COURT: Well --

17 MR. FORNACIARI: But more importantly, your Honor,
18 what they shouldn't have is what we told our clients
19 constituted a possible crime, and from that subset of facts
20 they want to learn from the client everything about what we
21 told them because it was what we told them that would lead to
22 the identity of the people involved in the plea, the identity
23 of the situations.

24 THE COURT: The identity of the people involved in
25 the plea, I'm not sure I follow you.

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1 MR. FORNACIARI: He says the only thing we're asking
2 for is the identity of the people who were involved in the
3 conduct pled to. Well, we've identified them. We've talked
4 to our client about them. That's how the client knows. The
5 client doesn't know what's chargeable conduct and what is not.
6 The client knows what communications it's had and it's told
7 him.

8 So, your Honor, what he's really asking you to do is
9 really take a second bite at the apple. There's no reason for
10 you to step back and reverse yourself.

11 THE COURT: Okay. Mr. Sedran?

12 MR. SEDRAN: Yes, sir.

13 Again, facts known by an attorney are discoverable.
14 I don't want to get into the legal analyses of Mr. Fornaciari.
15 If Nippon Cargo knows that it entered into agreements, then at
16 a deposition they have to tell us what the agreements are. If
17 their position is "we did not enter into any agreements," then
18 they have to say so under oath. That is not going to violate
19 the attorney/client privilege. I don't want to know what the
20 analysis was of Mr. Fornaciari in advising his client. Facts
21 known are discoverable, whether in an interrogatory or in a
22 30(b)(6) deposition.

23 In the Eli Lilly case, I'm reading from page two, it
24 says: "The state has already been furnished with the most
25 compelling evidence of the terms of the guilty agreement."

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1 THE COURT: I must have received a copy of Judge
2 Mann's opinion which was adopted by Judge Weinstein.

3 MR. SEDRAN: Correct.

4 THE COURT: Because it doesn't appear to be here in
5 published form.

6 MR. SEDRAN: In a second I could hand my copy up to
7 you, but I want to say that the plaintiffs, the State of West
8 Virginia, also wanted to know the factual basis for the plea.

9 In this deposition, I don't want to know the factual
10 basis of the plea.

11 THE COURT: But I think you're making a distinction
12 without a difference. I mean, you do. You want to know the
13 factual basis that -- you want to know what the defendant here
14 believed the factual basis for the plea was.

15 MR. SEDRAN: Well, with all due respect, what I want
16 to know is did Nippon Cargo enter into agreements with
17 competitors --

18 THE COURT: Their attorneys think there was enough
19 evidence that they did, and it seems to me if you have a
20 document that discloses what communications went back and
21 forth and you have the identification of the meetings that
22 occurred, whether a particular meeting and discussion rose to
23 the level of an agreement is what I think you're asking from
24 me.

25 MR. SEDRAN: Well, it's not because based on a

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1 limited record, we have seen that there were agreements
2 reached in some of the meetings in Japan, Mr. Cohen can
3 address that. So if it's not clear whether there was a
4 meeting -- I mean, whether there was an agreement because
5 you've got to piece e-mails together, well, that's fair that
6 he doesn't, Mr. Fornaciari doesn't have to reach the
7 conclusion 'yeah, that was an agreement.' But, if Nippon
8 Cargo, if it's their litigation position that 'we entered into
9 agreements, we're entitled to that,' if it's --

10 THE COURT: Well, they said they did. I mean, they
11 said that they did enter into an agreement. Somebody got up
12 and said that, I guess, on behalf of the corporation. He said
13 that on behalf of the corporation probably because his
14 attorney said, "That's what they're going to ask you and
15 you've agreed to say that."

16 MR. SEDRAN: Okay. But let's say --

17 THE COURT: And so, you have that admission "we
18 entered into agreements." They didn't go into any specificity
19 about what the content of that agreement or those agreements
20 were.

21 But you're asking now, I think, for them to say what
22 the content of the agreements were.

23 MR. SEDRAN: I am if it's the corporate position
24 that, in fact, they entered into agreements. If it was simply
25 for convenience that they pled guilty and in another court

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1 admitted that there were agreements, but in this litigation
2 they want to say on the record, "No, we really didn't enter
3 into agreement. The answer, Mr. Sedran, is no, there were no
4 agreements," well, then let them say that at a videotaped
5 deposition. It will be quick. But in good faith, if they
6 know they entered into agreements --

7 THE COURT: I'm sorry. Based on what I'm hearing
8 today, it sounds -- well, I don't think that the distinction
9 you're trying to draw is one that's meaningful. I mean, the
10 reason they believed they entered into an agreement is because
11 their attorney told them they entered into an agreement,
12 right, and they don't know, there's not a corporate
13 representative who knows what agreements they entered into
14 except an agreement as you've asked for, as referred to in the
15 plea agreement, that's devoid from what their attorneys told
16 them.

17 MR. SEDRAN: Well, that's true that it may be that
18 Mr. Fornaciari is one of the main sources of facts, but as
19 you've ruled --

20 THE COURT: No, he has gathered facts. He is also
21 the source of the legal conclusion, the mental conclusion that
22 those facts constitute an agreement that is referred to in the
23 plea agreement.

24 MR. SEDRAN: Just as a hypothetical, if someone from
25 Nippon Cargo said, "Mr. Fornaciari, yes, there was an

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1 agreement, we fixed prices with JAL or ANA," well, that
2 doesn't require much interpretation, and why is it that the
3 plaintiffs are not entitled to know facts known by the
4 company, especially if they come into court and say "We did
5 it," I think we're entitled to just ask them on the record:
6 "Did you enter into agreements with competitors to fix prices
7 of surcharges or rates?" If they now want to say "we
8 didn't," well, I'm going to have to live with that and prove
9 my case through the documents, but if in good faith they know
10 that they did enter into these agreements, I think we're
11 entitled to know it without asking Mr. Fornaciari to sift
12 through any evidence.

13 THE COURT: I'm not inclined to reverse myself based
14 on what I've heard. I believe this is an area that's fraught
15 with attorney/client privilege and work product privileged
16 information. I don't think it makes sense to compel somebody
17 to come in and reiterate what they said: 'Did you enter into
18 an agreement? Yes, we did. Do you know what the contents of
19 the agreement are? No, I don't, but the company said it
20 entered into an agreement, so that's as much as I know. What
21 were the agreements? I don't know, except for what my
22 attorney tells me.'

23 I don't think it makes sense to have somebody show
24 up and say that.

25 MR. SEDRAN: Well, thank you for giving me the time

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1 to present my argument.

2 THE COURT: I mean, you made some good arguments. I
3 mean, I understand the notion. It's just that I don't think
4 you can divorce the facts and the legal assessment of those
5 facts in these circumstances, and that's treading into
6 attorney/client matters. So I'll just have to adhere to the
7 prior ruling.

8 All right. Let's go to the other issue, which is
9 whether or not Nippon Cargo properly prepared their
10 representatives on the various subjects.

11 I wasn't absolutely clear about which subjects out
12 of the eleven you felt were, the testimony was deficient. It
13 looked like it was really concentrated only three of the
14 areas.

15 In any event, I did not go and study each of the
16 pieces of testimony, I'll be honest with you. I was looking
17 at the summaries. So I need a little bit more clarity on
18 that, where you think they fell short and to meet what Mr.
19 Fornaciari's response was that at least some of the inability
20 arises from the fact that this resolution of the Korean Fair
21 Trade Commission may not comport with reality, I mean with the
22 facts, at least as known to the defendant.

23 But anyway, I'll let you address it, and give me a
24 little bit more clarity on what it is, what specific areas you
25 think that they fell short and whether it's, indeed, possible

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1 for them to educate themselves given that some of the people,
2 if not all of the people, who were involved in the
3 communications about which you're interested are no longer
4 available to the company either.

5 MR. COHEN: Austin Cohen on behalf of the
6 plaintiffs.

7 THE COURT: I'm sorry, your first name?

8 MR. COHEN: Austin Cohen.

9 THE COURT: Thank you.

10 MR. COHEN: First off, in terms of which topics we
11 believe they didn't address, the answer is pretty much all of
12 them.

13 What we've done in the brief, for illustrative
14 purposes, is we've set out a number of instances where they
15 didn't provide information and we tried to cross-reference,
16 and the reason why we say all of them pretty much is because
17 there's significant overlap among the topics. For instance,
18 the KFTC resolution is a topic. The KFTC resolution discusses
19 ICAJ meetings where NCA met with JAL and/or ANA in Japan and
20 discussed setting fuel charges and rates. So the meetings of
21 the ICAJ as discussed in the KFTC resolution would be
22 responsive to, for instance, eleven. It would also be
23 responsive to seven, to nine and to four.

24 THE COURT: So can I take --

25 MR. COHEN: So, we've done some of that

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1 cross-reference.

2 THE COURT: Can I take from that then that what you
3 are -- maybe it's better to identify it as subject matter as
4 opposed to topic.

5 MR. COHEN: Right. The subject matter is we were
6 trying to get at meetings and communications where we believed
7 agreements were reached or fuel surcharges were discussed.
8 Purposes of the topics was to help NCA prepare their
9 designees. We're narrowing down you need to look at the KFTC
10 resolution, you need to look at meetings and communications,
11 you know, ICAJ meetings, but there's overlap.

12 For instance, to the point that it's not exclusive,
13 let me show you we don't discuss in the exhibits topic five
14 which is G8 meetings, which was this global group. If you go
15 to Mr. Kato's deposition, I have a copy here if you want me to
16 hand it up.

17 THE COURT: Is it there?

18 MR. COHEN: Kato's deposition is Exhibit 5.
19 If you look at page 226, lines five through eleven.

20 MR. FORNACIARI: Could we have a date?

21 MR. COHEN: A date of the deposition?

22 MR. FORNACIARI: Yes.

23 MR. COHEN: July 14th.

24 Page 226, lines five through eleven Mr. Kato said he
25 does not know if NCA attended G8 conferences in or about April

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1 of 2000. Lines twelve through fifteen on the same page, he
2 does not know where G8 conferences were even held. Lines 16
3 through 20 on that page, he does not know if rates were
4 discussed at G8 conferences. And lines 21 through 25 on that
5 same page, he does not know if G8 attendees ever agreed to
6 increase rates.

7 THE COURT: Was he the designated witness for
8 topic --

9 MR. COHEN: Yes, he was. He was designated for
10 everything except for three topics.

11 But, you know, really we think it's a pretty simple
12 argument, and if you go through the testimony, it speaks for
13 itself. We noticed the eleven topics which we think was a
14 reasonably narrow universe of information for them to prepare
15 the designee on.

16 The rule is that NCA is obligated to produce a
17 properly educated witness. You yourself at the last hearing
18 correctly stated, quote: It's the institutional witness's
19 obligation to make sure they have somebody educated enough to
20 answer the questions.

21 Here, NCA did not do that. NCA and Mr. Kato and Ms.
22 Shingu simply did not do their homework. They could not
23 answer questions about almost every meeting or communication
24 we asked about, including the limited universe of meetings and
25 communications contained in the KFTC resolution, and we think

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1 that's a particularly useful example of how unprepared their
2 designee was.

3 I have a copy of the translation that we had in our
4 possession before the deposition. If you'd like, I can hand
5 it up as well, the translation of the KFTC resolution. We had
6 a copy that we obtained and we translated it.

7 THE COURT: Had that been supplied to the defendant?

8 MR. COHEN: That copy had not been, but the
9 deposition notice cited the KFTC resolution by the proceeding
10 number from the Korean Fair Trade Commission.

11 THE COURT: By the? I don't understand.

12 MR. COHEN: The KFTC stands for the Korean Fair
13 Trade Commission.

14 THE COURT: Right. You said by the preceding
15 number?

16 MR. COHEN: By the proceeding.

17 THE COURT: Proceeding number.

18 MR. COHEN: And it's Resolution Number 2010-145.

19 Mr. Fornaciari admitted on the record at the
20 deposition that of course Nippon Cargo had a copy of the
21 resolution, they were a party to the proceedings, and yet if
22 you go through every single meeting and communication
23 contained within that resolution we asked about, he was unable
24 to provide any information about.

25 And if you go to the end of our questioning of the

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1 KFTC resolution, I asked him what he did in particular to
2 prepare for his designation as the KFTC witness. His answer
3 was, quote: I did not do any preparation in particular. Page
4 143, lines 15 through 16.

5 On page 144, line eight I asked him did anybody show
6 him documents regarding meetings and communications contained
7 in the KFTC resolution. His answer was, quote: I did not see
8 any.

9 And finally, after going through specific meetings
10 and communications that we believe are contained in their copy
11 of the KFTC resolution, I asked if he could tell me based on
12 his preparation what meetings and communications he was aware
13 of that are set out in the KFTC resolution, any meetings and
14 communications. His answer was on page 146, line 15 through
15 16, quote: I do not have any information regarding any
16 specific meeting, close quote.

17 So, at a minimum, we believe if he was properly
18 prepared, NCA should have at least sat down with him with the
19 resolution, the unredacted resolution that they received as a
20 party to the proceedings and gone through those meetings and
21 communications. Additionally --

22 THE COURT: Did the KFTC resolution identify
23 specific communications or documents that it --

24 MR. COHEN: It does.

25 THE COURT: Does it cite the documentation in

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1 support of its --

2 MR. COHEN: It cites to documentation. It
3 describes, for instance, e-mails that were sent by some
4 attendees at these meetings to other attendees. It discusses
5 in many instances official ICAJ subcommittee meetings, and one
6 of the things I had asked even during the deposition was if he
7 was aware whether or not minutes were kept at ICAJ meetings
8 and he said he wasn't. I don't think we've seen any ICAJ
9 minutes in the NCA documents.

10 But, again, those are the types of materials that
11 NCA should have collected and used to educate Mr. Kato.

12 It's also worth noting that the copy of the KFTC
13 resolution we reviewed, the names of NCA employees who
14 attended meetings and had communications were redacted. So
15 part of it is we wanted to find out who they were. They even
16 have that information at least because they have the
17 unredacted resolution. We couldn't get any information from
18 him.

19 And it's true, if you go through the summaries, the
20 Exhibit 6, 7, 8, you can see that's true throughout the
21 deposition beyond just the KFTC resolution, and when we asked
22 about meetings and communications contained in interrogatory
23 answers, they were unable to provide any additional
24 information about the substance of any such meeting, what was
25 discussed, what was agreed to, or any communication.

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1 THE COURT: They couldn't give you even the subject
2 matter that was discussed?

3 MR. COHEN: Not beyond what was already in the
4 interrogatory. For the ones that were --

5 THE COURT: I don't know what was in the
6 interrogatory answers. I can't recall.

7 MR. COHEN: When previously before you, you had
8 ruled for purposes of answering interrogatories so that the
9 defendants --

10 THE COURT: No, I remember that they had to provide
11 at least the dates and participants in meetings. I don't
12 remember how much farther than that --

13 MR. COHEN: And the subject matter, but not any of
14 the substance, and the purpose of that was since that was
15 coming from the attorney's investigation, it wouldn't require
16 the company to do anything.

17 THE COURT: Right.

18 MR. COHEN: This is the time when the company has to
19 sit down with their designee and educate him, and they just
20 didn't do their homework.

21 THE COURT: All right. And you say basically it had
22 to do with they fell particularly short in connection with the
23 meetings identified in the KFTC resolution and meetings
24 relating to the ICAJ.

25 MR. COHEN: Well, I'm using that as an example

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1 because those are instances where we could say that 'is it
2 true that on a date certain, you know, these companies or
3 these people met and discussed blank?' There are many other
4 instances through our discovery where we believe there were
5 meetings or communications. Many of them are summarized in
6 those exhibits 6, 7 and 8 where they simply could not provide
7 any information. We just use these, particularly the KFTC and
8 the interrogatories, because it's a very limited universe of
9 communications. They can't argue 'you were asking us to go
10 through six years worth of documents and look for a needle in
11 a haystack.' It's 23 meetings. They are summarized in the
12 KFTC resolution. NCA received a copy of that as a party to
13 the proceedings. NCA should have collected whatever
14 information it had. NCA should have gone and seen if it had
15 documents from its former employees that it could have used to
16 educate Mr. Kato. The obligation is on NCA to educate Mr.
17 Kato. The obligation is not on Mr. Kato to educate himself,
18 and if you look at the brief they filed, they talk about the
19 efforts Mr. Kato made to contact the former employees after
20 the fact when he was preparing for the deposition. What they
21 don't talk about is if anyone at NCA at any point had met with
22 one of the former employees, such as Mr. Katayama, and have
23 facts and information that they collected from Mr. Katayama,
24 those facts and information should have been given to Mr. Kato
25 so he could be prepared.

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1 THE COURT: Okay.

2 Mr. Fornaciari?

3 MR. FORNACIARI: Your Honor, I would like to split
4 up these witnesses into two, they're two different witnesses,
5 and they were noticed for two different subjects.

6 I don't know if you have in front of you the
7 subjects the notice cover.

8 THE COURT: The notice? I did look at the
9 deposition notice, and there was something like eleven topics
10 it covered, and Miss Shingu appeared on some and Mr. Kato on
11 the other.

12 MR. FORNACIARI: Let's first talk about Miss Shingu.

13 THE COURT: Well, they didn't talk much about Miss
14 Shingu. Let's talk about Mr. Kato.

15 MR. FORNACIARI: Maybe we can stipulate Miss Shingu
16 is --

17 THE COURT: I don't think they're stipulating to
18 that. But Mr. Kato was designated, I gather, to talk about
19 the various meetings in the KFTC resolution and the ICAJ and
20 the G8 topics.

21 MR. FORNACIARI: Let me say, your Honor, with
22 respect to the G8. I represented this client, this Japanese
23 client, since 2006 when it got the subpoena. I interviewed a
24 lot of witnesses. I represented them in the criminal case as
25 well as in the civil case. I have never heard any witness

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1 from NCA use the word "G8." So, to assume that the witness
2 was not prepared on G8 meetings has within it an implicit
3 assumption that they knew about G8 meetings. As far as I
4 know, your Honor, NCA knows nothing about G8 meetings. That's
5 the first thing.

6 THE COURT: The G8 conference.

7 MR. FORNACIARI: Whatever.

8 THE COURT: Okay.

9 Can I just ask the plaintiffs what is the G8
10 conference? I mean, I've heard of G8 in connection with, I
11 guess, countries that make up the G8. Is that what this is
12 referring to?

13 MR. FORNACIARI: I don't know. No one knows. So
14 that's how critical it is to this case.

15 MR. SEDRAN: Well, we do know. Actually, we do
16 know.

17 THE COURT: Is it the same G8 conference of the
18 government leaders?

19 (Pause in the proceedings.)

20 MR. COHEN: It's a group of eight carriers.

21 MR. FORNACIARI: Do we know what eight carriers?

22 THE COURT: All right.

23 MR. FORNACIARI: All right, your Honor. So, if we
24 look at --

25 THE COURT: So you're saying your client doesn't

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1 refer to it at least as a G8.

2 MR. FORNACIARI: No.

3 Now, if you look at these eight categories,
4 plaintiffs want to separate them out into overlapping
5 categories, but they noticed them separately. So, for
6 example, item two is interrogatories. Item three is
7 surcharges. Item four is attendance at ICAJ meetings.

8 Now, what your Honor doesn't know that the ICAJ had
9 three subcommittees. One subcommittee had to do with the
10 United States, that is, traffic to and from whatever country
11 it was, Japan to the United States. A second one had to do
12 with traffic between Japan and Europe, and a third one was
13 inter-Asia. That's three. So when they talk about ICAJ
14 meetings, and you have to understand that some of the ICAJ
15 meetings had absolutely nothing to do with this case because
16 they were inter-Asia or they were inter-Japan to Europe. It
17 had nothing to do with traffic back and forth between the
18 United States and Japan.

19 So, if you read through this, we identified Mr. Kato
20 for items one, two, four, five, six, seven, eight, nine, ten
21 and eleven. Okay.

22 THE COURT: So the only one he wasn't is item three?

23 MR. FORNACIARI: So he was identified for all of
24 those, right.

25 THE COURT: Except for three. You said one, two,

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1 four, five, six, seven, eight, nine, ten and eleven.

2 MR. FORNACIARI: I don't think he was identified for
3 three.

4 THE COURT: That's what I'm saying. Except for
5 three, he was identified in response to all the other except
6 for three.

7 MR. FORNACIARI: Right.

8 Now, this motion indicates that he was -- they are
9 not moving on items five, seven, eight, nine and ten. So that
10 means Mr. Kato must have been prepared adequately on at least
11 those.

12 THE COURT: No. G8, they were complaining about the
13 fact that he didn't know anything about G8. So they just
14 saw --

15 MR. FORNACIARI: Well, they didn't move.

16 THE COURT: I wouldn't make that assumption.

17 MR. FORNACIARI: Right, but they didn't make a
18 motion on it.

19 THE COURT: No.

20 MR. FORNACIARI: Let's go back. I'm sorry, I didn't
21 mean to confuse the Court.

22 THE COURT: Granted, the plaintiffs have discussed
23 this not so much in reference to the specific topics listed in
24 the deposition notice, but the general lack of information of
25 Mr. Kato. They didn't focus on Miss Shingu, but general lack

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1 of knowledge about any number of anything relating to
2 meetings, whether ICAJ or G8 conference or meetings described
3 in the interrogatory responses. He just didn't know anything.

4 MR. FORNACIARI: Yeah, but, your Honor, that's not
5 true. They had the deposition taken for days. They had to
6 say something besides "I don't know."

7 THE COURT: Well, I guess I'm going to have to read
8 these depositions and decide whether he had any answers that
9 were meaningful.

10 MR. FORNACIARI: No, don't. I mean, listen.

11 THE COURT: The plaintiffs are absolutely right,
12 that it is the defendant's obligation to educate somebody who
13 can talk about what happened at these meetings that they're
14 asking about, and that may mean that you're going to have to
15 disclose to the witness what you learned --

16 MR. FORNACIARI: I did.

17 THE COURT: -- because of your investigations.

18 MR. FORNACIARI: I did, your Honor.

19 THE COURT: Well, maybe you did, but he didn't know
20 it. I mean, somebody --

21 MR. FORNACIARI: But, your Honor, you're just
22 hearing one side of it.

23 THE COURT: Okay. Well, I'm going to give you a
24 chance to tell me about your side of it.

25 MR. FORNACIARI: All right. So, the other side is

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1 Mr. Kato was in charge of sales and marketing between 2001 and
2 2005 in the United States. His responsibilities were fuel
3 surcharges and rates. So he knew of his own personal
4 knowledge about whatever those topics would entail.

5 Moreover, we --

6 THE COURT: But wait. Does that mean that he
7 attended the meetings that they were asking about? Probably
8 not, right?

9 They were asking about meetings.

10 MR. FORNACIARI: Right, and so Mr. Kato told them,
11 they talked about ICAJ meetings, right. Mr. Kato said to
12 them: "I would like to add about the ICAJ meetings, I believe
13 that the NCA employees who attended those meetings were Mr.
14 Fujimura and Mr. Sasano. As far as Mr. Fujimura, I attempted
15 to contact him and I explained I wanted to get information
16 from him, and he, however, declined, so I was not able to get
17 any more information from him. About Mr. Sasano, I didn't
18 know where he was. He left the company several years before."
19 This is on page 148.

20 So, your Honor, one of the real problems here is not
21 that we haven't tried to prepare these witnesses. Kato
22 testified he read a banker's box of other people's documents
23 and e-mails. A banker's box. Someone from plaintiff's side
24 said there's something like three thousand documents in a
25 banker's box of documents. Now, these are documents that the

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1 lawyers selected and gave him to read to help educate him.

2 He also said he met with the lawyers, after he read
3 the documents, for at least six hours.

4 THE COURT: But if he didn't know anything in
5 response to the questions, then what was that exercise worth?

6 I mean, obviously certainly for the interrogatory
7 responses somebody knows that there were meetings that
8 occurred with respect to various subjects. They want to know
9 what the substance of those meetings was. They're entitled to
10 know that. Somebody's got to know the answer to those
11 questions, right? And Mr. Kato, they say he didn't. I guess
12 I can read through and see if he answered.

13 MR. FORNACIARI: He didn't know a lot of questions
14 they answered.

15 THE COURT: I'm sorry?

16 MR. FORNACIARI: He didn't know a lot of answers to
17 questions he was asking.

18 THE COURT: Then somebody has to --

19 MR. FORNACIARI: But just because somebody doesn't
20 know doesn't mean the answer's there somewhere.

21 THE COURT: Why not?

22 MR. FORNACIARI: Why? Because we did not write the
23 KFTC resolution that's 120 pages long. The KFTC went out and
24 obtained information from who knows where and then they listed
25 it. Plaintiffs got that list and decided that NCA witnesses

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1 would know that list. That's not something we gave to them
2 and said here's the list of -- here's the list of meetings
3 that we attended and we know about it. This is a list
4 published by some agency in Korea. We don't know where they
5 got that information. That information didn't come from us.
6 NCA had a general sales agent in Korea. It didn't even have
7 an employee there. Okay. It was an independent entity.
8 Right.

9 So, Mr. Kato tried to tell them that the two people
10 who know the details, we told them there were ICAJ meetings.
11 We told them that these people attended. We told them that
12 they discussed fuel surcharges at these meetings. Now they
13 want to know details, on this particular date who attended and
14 what was said. We don't have that information, your Honor,
15 and the people who have it are no longer with the company.

16 So you can order me to produce a well-prepared
17 witness, and I tried to prepare the witness well. So I don't
18 know if they're going to get anything more from them.

19 We admitted there were meetings, someone from NCA
20 went to them and they discussed fuel surcharges.

21 THE COURT: Then why don't you know who from NCA
22 went to the meetings?

23 MR. FORNACIARI: We did. We did. We told them,
24 Sosano and Fujimura. We gave them all the e-mails that we
25 could find from these people. They're not here anymore.

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1 So, you could order me to produce another witness.
2 I'd get that box of documents, I'd sit down with them, I'd go
3 through them again, and we'd have the same thing.

4 THE COURT: Well, did Mr. Kato read the e-mails
5 prepared by these two gentlemen?

6 MR. FORNACIARI: He read all of them that were in
7 that box and that was all the relevant ones.

8 THE COURT: I don't know what that means.

9 When you say "all the relevant ones," are you saying
10 they're all the ones that occurred around the times of these
11 meetings?

12 MR. FORNACIARI: Yes, that we found.

13 THE COURT: But, then if he read those, he still
14 couldn't answer questions, I gather, about what happened at
15 the meetings to the extent that was disclosed in these
16 e-mails?

17 MR. FORNACIARI: Right, because there may not be a
18 lot of e-mails that said 'on such-and-such a date we had a
19 meeting and this was discussed.' Things didn't happen that
20 way, as far as I know.

21 Now, they have --

22 THE COURT: All these e-mails are in Japanese too, I
23 gather. Or -- yes, probably Japanese.

24 MR. FORNACIARI: A lot of them are.

25 THE COURT: So you don't even understand what they

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1 say.

2 MR. FORNACIARI: I have some translations of
3 e-mails.

4 THE COURT: Oh, you do.

5 MR. FORNACIARI: But, your Honor, I mean, I know you
6 don't want to -- we've been talking about a 120-page report
7 published by an agency.

8 THE COURT: Well, that's one of the things, but I
9 believe if I recall what Mr. Cohen said is that there were 23
10 meetings identified in your Answers to Interrogatories where
11 the subject matter is disclosed but none of the substance
12 because I didn't require that in the Answer to Interrogatories
13 in anticipation that there would be a deposition of precisely
14 this nature where someone would testify on behalf of the
15 company about what happened at these meetings and what the
16 discussions were at the meetings. I gather, I haven't read
17 the deposition, but I gather that that was not -- they weren't
18 able to get that information.

19 Let's even put aside the KFTC. I understand what
20 you're saying about the KFTC resolution, but there's nothing,
21 they've gotten nothing, virtually, with respect to the
22 meetings that even you identified in the Answers to
23 Interrogatories.

24 MR. FORNACIARI: Your Honor, we had a witness, Kato
25 testified that in the United States when he was responsible

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1 for the fuel surcharges, when they decided to move the fuel
2 surcharge, he called his counterpart in JAL and said, "I'm
3 going to move on such-and-such a date." We went through that.

4 THE COURT: When you say "move," what do you mean?

5 MR. FORNACIARI: Raise it up or lower it.

6 He testified about that. He knew about it, he
7 testified about it. It's damaging. We're not hiding the ball
8 from these people. I wish I had more balls to throw them. I
9 just don't, you know.

10 So you could order us to do it again and we'll be
11 happy to give it another try, but please don't order Ms.
12 Shingu to come back again because we haven't discussed her and
13 it would really be an abuse to do that.

14 She was responsible for the fuel surcharge in Japan.
15 She was only noticed for that, for those three topics, and she
16 testified --

17 THE COURT: Well, you mean that's who you identified
18 to be responsive on those three topics.

19 MR. FORNACIARI: That's right, your Honor.

20 THE COURT: Okay.

21 MR. FORNACIARI: And those were topics three, eight
22 and ten, and she testified about them. She testified about
23 them ad nauseam. She was there for like four years right in
24 the middle of the alleged conspiracy period, and she testified
25 about it ad nauseam.

1 So, when you look at Exhibit 7 to their docket
2 number 1555, which is the motion relating to the 30(b)(6), and
3 you look at what they've identified in Exhibit 7, when you
4 read behind these page transcript numbers, what you will see
5 is she was being asked about interrogatory answers. That is,
6 for all but the last four items on the page. The last four
7 items on that page she was being asked about the KFTC
8 proceedings.

9 So, when she was asked about how did you raise the
10 fuel surcharge, what was the formula used, she testified about
11 it. She testified about how it was done every time.

12 So, it's because the plaintiffs want to say that
13 these topics overlap, they want to say 'well, she didn't
14 testify about the KFTC order.' She wasn't noticed for the
15 KFTC order. We didn't designate her for the KFTC order. We
16 designated her for three discrete topics and she testified
17 about them.

18 Now, they want to say these three discrete topics
19 relate to a whole bunch of other topics. Well, someone should
20 have told us because we could have prepared Miss Shingu on
21 something else, but that's what she did.

22 So, I don't know what you're going to do about Mr.
23 Kato, but it would be really abusive to require this woman to
24 reappear.

25 THE COURT: Well, eleven is a pretty broad

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1 communications meetings and/or something described in
2 Resolution Number 2010-145.

3 You do have a copy of that, the KFTC resolution?

4 MR. FORNACIARI: The KFTC resolution, my client has
5 a copy. It was sent to him in Korean. I think they had it
6 translated into Japanese.

7 THE COURT: It does not -- I see. It was in Korean.
8 It was translated to Japanese.

9 Do you have an English copy of it?

10 MR. FORNACIARI: Only the one that I was provided by
11 the plaintiffs.

12 THE COURT: I see.

13 MR. FORNACIARI: And, your Honor, when you think
14 about the KFTC resolution, remember, this is the Korean Fair
15 Trade Commission. They're investigating traffic between Japan
16 and Korea, not the United States.

17 THE COURT: But the surcharges, I mean, we're
18 talking about discovery here. So the surcharges that may have
19 been agreed to there or are discussed in meetings that related
20 to that could have some relationship to this.

21 MR. FORNACIARI: That's why I told you there were
22 three different committees to the ICAJ, one dealing with Asia.

23 THE COURT: Right.

24 Yes, Mr. Cohen?

25 MR. COHEN: First let me just touch on a couple of

1 things.

2 First off, with regard to the KFTC resolution, the
3 KFTC issued four resolutions. The one that we cite here
4 explicitly dealt with cargo shipments from Japan. Those cargo
5 shipments, and in the resolution when it describes meetings
6 and communications and agreements that were reached, it
7 discusses them reaching global agreements to fix fuel
8 surcharges and/or rates from Japan to all destinations,
9 including the United States. It's also the same thing for
10 some of the other motions.

11 Also, the same thing applies with the ICAJ meetings.
12 There were three subcommittees, but many of the subcommittees
13 when they met, they reached agreement about fixing surcharges
14 from whatever region they were responsible for to all
15 destinations, including United States. We've alleged a global
16 conspiracy. The fact that they were globally fixing
17 surcharges and rates through these trade organizations is
18 relevant.

19 Let me just, in terms of Mr. Fornaciari going
20 through whether or not Miss Shingu was designated for those
21 questions, that's Mr. Fornaciari reading in what our source
22 was, foundation was to ask about a particular ICAJ meeting.
23 For instance, the KFTC says that the ICAJ met on a certain
24 date and NCA attended along with JAL and ANA and they
25 discussed fixing a fuel surcharge. We got the information

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1 that there was a meeting on that date certain and that they
2 discussed that from the KFTC, but if you read through, at no
3 point did I ask Miss Shingu: "According to the KFTC
4 resolution on page X is it true that?' Instead, what we asked
5 her was: "Is it true that NCA met with JAL and ANA in an ICAJ
6 in Japan and discussed blank?" She's been designated to
7 cover communications between JAL and ANA regarding fuel
8 surcharges.

9 So, if we ask a question saying did NCA meet with
10 JAL and ANA in an ICAJ meeting and discuss fuel surcharges,
11 that falls underneath the topic she was designated for.

12 THE COURT: Where are those designations made?

13 MR. COHEN: In Exhibit 2, there is a letter from Mr.
14 Fornaciari.

15 THE COURT: In Exhibit 2?

16 MR. COHEN: Exhibit 2.

17 However, he did make one modification during the
18 deposition. For topics eight and ten, and actually I think
19 it's a footnote in the letter brief, footnote one in the
20 letter brief. Originally I think he had designated Miss
21 Shingu for eight and ten and during the deposition he changed
22 it so that Miss Shingu is designated only for eight and ten
23 for shipments from Japan and Mr. Kato was designated for
24 discussions with JAL and ANA, for instance, for shipments from
25 the U.S., and I can give you the cite in the deposition where

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1 that clarification was made. It was in Miss Shingu's
2 deposition on the 13th, page 24, line 11 through 26, line 18.

3 So, another point is I think he's downplaying the
4 KFTC resolution. This was a finding by the Korean Fair Trade
5 Commission that resulted in them recommending penalties,
6 significant financial penalties for NCA. And again, this
7 resolution, the one we cited, was for shipments Ex-Japan, not
8 Ex-Korea. Ex-Japan many of the meetings were for fixing rates
9 and surcharges Ex-Japan to all destinations including the
10 United States.

11 THE COURT: All right. Well, it looks like I'm just
12 going to have to look through the depositions --

13 MR. COHEN: I'm sorry. I also have one more
14 instance.

15 THE COURT: -- and make some judgments about whether
16 they supplied a witness who was properly prepared.

17 MR. COHEN: I'm sorry. One more point, if I may.

18 THE COURT: Yes.

19 MR. COHEN: He's correct, Miss Shingu was deposed
20 the day before her 30(b)(6) deposition individually. In her
21 30(b)(6) deposition, I tried not to ask her questions about
22 meetings and communications she was personally involved in.
23 That was covered. That she provided some substantive
24 testimony for.

25 If you read through this, you'll see when she was

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1 testifying as designee for meetings and communications where
2 she wasn't the person involved, she really had no information,
3 and if you go through notes on her preparation -- or, sorry.
4 If you go through when she was asked what she did to prepare,
5 she basically said all she did was look through her e-mails
6 before she came over and then she met with the attorneys.

7 As for Mr. Kato, he was deposed. We rolled the two
8 depositions together, his 30(b)(6) and his personal
9 deposition, and even when he was being deposed based on his
10 personal knowledge, he fell short of providing complete
11 testimony. If you go to page 232, line 25 through 234, line
12 18 he couldn't even remember if he himself met with JAL at a
13 restaurant and, if he did, he doesn't remember what he
14 discussed.

15 At one point, I think we discussed whether or not he
16 was being overly evasive during the deposition, but I think
17 we're saying he was unprepared for many of these topics, or
18 for all these topics.

19 MR. FORNACIARI: Your Honor?

20 THE COURT: I suppose --

21 MR. FORNACIARI: Can I just be heard for one minute
22 about the KFTC report?

23 THE COURT: The KFTC resolution you mean, or the
24 report? Because there was a final report.

25 MR. FORNACIARI: I don't know whether they're

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1 calling it a resolution or a report.

2 MR. COHEN: It's officially called a -- what we have
3 is officially called a resolution.

4 THE COURT: But I remember there was some discussion
5 earlier, not today but previously, about a report that was
6 issued by the KFTC.

7 Is that the resolution? Is the resolution --

8 MR. COHEN: They imposed fines, yes.

9 THE COURT: I'm sorry?

10 MR. COHEN: They imposed fines. At the back of this
11 resolution, again if you look for reference I can give you our
12 translation which was used as an exhibit, although was not
13 referenced when we were asking Mr. Kato questions, but I can
14 hand it up to the Court.

15 THE COURT: What do you mean it wasn't referenced?

16 MR. COHEN: I initially introduced it as an exhibit.

17 THE COURT: At the deposition?

18 MR. COHEN: At the deposition. An objection was
19 made that this wasn't the copy they had, he wasn't sure what
20 this was, it was tough for him to follow the pages, this was
21 in English and was redacted. So at that point, I said you can
22 put that one aside. As a designee, he should have been
23 prepared with their complete copy of the KFTC resolution.

24 So, I can give you this copy for the Court's
25 convenience, with the understanding though that this is what

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1 we used as a foundation for our belief that there were such
2 meetings and communications.

3 THE COURT: I'm not sure I know what I'm going to
4 get from that other than dates about which you asked questions
5 about meetings. That's what you used as your source --

6 MR. COHEN: Correct.

7 THE COURT: -- and that's going to be in the
8 transcript as well.

9 MR. COHEN: It will be in the transcript. It will
10 also be in the summary where it summarized the questions
11 regarding communication. So yes, it will be in there.

12 THE COURT: In the summary, I see. Right.

13 MR. COHEN: Right.

14 THE COURT: So I'm not sure I need to see that as
15 well as an additional. I mean, if I do in reviewing this,
16 because I'm not going to be able to make a decision today.

17 MR. FORNACIARI: Your Honor, maybe you ought to have
18 this because getting ready for this hearing, I went through it
19 because I didn't think it was -- it was really a good document
20 to use with my client, and there were -- I don't know if this
21 is complete, but I came up with thirteen references to
22 meetings in which they said Nippon Cargo was at and it says
23 what the source is of the information in the report, and I
24 looked at the source and the source was Lufthansa on almost
25 all of them and Korean Air on about three of them. So not one

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1 of these sources for these allegations would be found in the
2 Nippon Cargo files.

3 So, if the question here is whether Nippon Cargo can
4 get ready and research this and go find things, based on what
5 I did, the source isn't at Nippon Cargo. So if you want to
6 look at that --

7 THE COURT: The source of information that such a
8 meeting occurred?

9 MR. FORNACIARI: Yes, your Honor.

10 So, the KFTC resolution or report or whatever it is
11 says a meeting occurred on such-and-such a date, 4/10/22,
12 source LH, Lufthansa. Then it says what the venue was. So
13 it's in there and it tells you where the information
14 purportedly comes from that they're reciting in the report,
15 and according to what I've got, everything I've seen so far is
16 either Lufthansa or Korean.

17 THE COURT: I'll ask the plaintiffs, how am I
18 supposed to resolve the issue if the defendant says KFTC
19 reached a conclusion that such a meeting occurred. We don't
20 have any information that such a meeting occurred. We don't
21 know what happened at the meeting that KFTC decided occurred
22 and, therefore, we can't answer questions about that. How am
23 I supposed to resolve that?

24 MR. COHEN: Well, your Honor, at this deposition,
25 that is pretty much what he said, but that's because they

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1 didn't do their homework. From what we can see, from what we
2 asked Mr. Kato, he did absolutely no preparation, for instance
3 we're talking KFTC in particular, but he did no preparation.
4 He didn't even look at a copy of the resolution, which was one
5 of the noticed topics, before he was deposed.

6 Mr. Fornaciari talks about the fact that he
7 interviewed lots of employees.

8 THE COURT: Maybe it makes sense for me to look at
9 that. What good would it do for him to look at it and --

10 MR. COHEN: If he looks at it and he sees the names
11 of NCA employees who they're alleging attended these meetings
12 who receive letters from other attendees, some of the
13 Lufthansa references are the fact that a person sent an e-mail
14 to all the other attendees of the meeting after the fact,
15 which I assume meant that he probably sent it to whoever the
16 NCA representative was. He could have, or I should say NCA
17 should have done an investigation, seen if they had documents,
18 facts, or other information from the individuals who were
19 involved in these meetings and then educated their designee so
20 that he would know whatever information was possessed by NCA
21 or his counsel, factual information.

22 Mr. Fornaciari said that he interviewed lots of NCA
23 employees, including former employees. Did he interview the
24 NCA former employees who attended these meetings, and does he
25 have factual information from those employees?

1 THE COURT: You're talking about I think Mr. Kato
2 said, or maybe he didn't say it in his deposition, Mr.
3 Fornaciari is representing that -- or I think he did actually
4 say in his deposition, "I tried to reach out to such-and-such
5 people and one of them didn't respond and one of them declined
6 to talk, or two of them declined to talk."

7 MR. COHEN: Mr. Kato said in preparation as the
8 designee he tried to reach out to three former employees.
9 There were several other employees in the interrogatory
10 answers who he's never tried to reach.

11 THE COURT: In the interrogatory answers designated
12 as people who participated in meetings identified in
13 interrogatory answers, is that what you're talking about?
14 Not necessarily KFTC meetings, meetings referenced in the
15 KFTC.

16 MR. COHEN: Right. The question is that Mr. Kato
17 shouldn't be out when he's preparing for the deposition doing
18 this. NCA should have done an investigation of their own
19 files and collected the facts that they know institutionally
20 and educated Mr. Kato.

21 THE COURT: I don't disagree, but they said they
22 gave him a banker's box of documents. So I'm presuming that's
23 what they did. What the overlap is, I don't know.

24 MR. COHEN: It was cagey about how many documents he
25 reviewed.

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1 THE COURT: I'm sorry?

2 MR. COHEN: It was cagey about how many documents he
3 actually reviewed. But we don't know what was in there. We
4 certainly didn't ask because that was attorney privilege.

5 He says he attempted to, for instance, contact these
6 three formers. The question is, for instance, if Mr.
7 Fornaciari when he was representing them, did he ever
8 interview these three formers, and does he have factual
9 information he collected from them as relevant?

10 THE COURT: Well, that's certainly, that's fair. I
11 mean, if you interviewed them and have information you could
12 pass on to Mr. Kato about that, it seems to me that's
13 something that he needs to look at to prepare.

14 MR. FORNACIARI: I agree with that, your Honor, and
15 I did it.

16 But, your Honor, they are assuming, they are
17 assuming that when I interviewed these witnesses I was getting
18 ready for the KFTC questions. I mean, I might have asked them
19 a lot of different questions, questions that I was interested
20 in about the United States.

21 And I did prepare my witnesses. So, I mean, to
22 think that -- and when he says he's cagey about the documents
23 he reviewed, I'm trying to get the cite so if you wanted to
24 you could look at it. He actually said to him, "Well, how
25 many documents did you review?" And he was fumbling around,

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1 he speaks Japanese, so I don't know how good the communication
2 was. And so there was a banker's box in the corner and he
3 said, "Well, what was the volume? Was it a foot? Two feet?"
4 He didn't understand that. So then he said, "Well, look at
5 one of those boxes. Was it that big?" And he said, "Would
6 they fit in that?" He said, "Well, I don't know. It would be
7 close."

8 THE COURT: I got a lot of reading to do.

9 MR. FORNACIARI: I'm sorry, your Honor, believe me.

10 THE COURT: I mean, I think that's the only way I
11 can look at this. I mean, I have to see what was asked, what
12 he said about how he prepared.

13 MR. FORNACIARI: We have citations in our brief to
14 what he said about how he was prepared, if that helps you at
15 all.

16 THE COURT: But it seems to me, maybe I should take
17 the KFTC report too. I will take a copy if you have it.

18 MR. COHEN: (Handing to the clerk.)

19 THE COURT: I gather there were some things that
20 were redacted from this, from the report?

21 MR. COHEN: Yes, your Honor. That was the point is
22 we have a redacted copy that was incomplete. We couldn't even
23 get the information that's redacted out of Mr. Kato.

24 THE COURT: Because he had not seen the report,
25 you're saying.

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1 MR. COHEN: He testified, correct, he testified he
2 didn't do anything to prepare, he had never seen it before.

3 THE COURT: Why shouldn't he be prepared for that,
4 Mr. Fornaciari?

5 MR. FORNACIARI: I'm sorry, your Honor. I missed
6 it.

7 THE COURT: Apparently Mr. Kato, having not actually
8 reviewed the resolution, was unable to testify about who
9 attended meetings that are described in the report, and maybe
10 he can testify whether any meetings occurred, but he didn't
11 have any knowledge whatsoever one way or the other, I gather,
12 about meetings disclosed in here.

13 Is there some way that I can -- I mean, the whole
14 report goes into a lot of things that are unrelated to.

15 MR. COHEN: The best summary -- I don't have a --

16 THE COURT: These are ICAJ meetings. Well, they do
17 say Nippon Cargo were there.

18 (Pause in the proceedings.)

19 MR. COHEN: As I said, the questions we asked were
20 basically harvested from the resolution, and if you go through
21 the summary we have, Exhibit 6, it doesn't have a page cite to
22 the resolution obviously, but that summarizes the meetings
23 contained in there and the information we could get from that.

24 And again, I think I pointed this out earlier, but
25 in terms of his preparation, on page 144, line eight when we

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1 asked him if anybody had shown him documents about meetings or
2 communications contained in the KFTC resolution, he said: "I
3 did not see any."

4 MR. FORNACIARI: Your Honor, I don't want to belabor
5 this.

6 That's because NCA was not the source of any of the
7 information. The colloquy about banker's box, not banker's
8 box is on page 33 and 34 of the July 13th deposition.

9 MR. COHEN: Your Honor, we also believe that as a
10 party to the proceedings and respondent, NCA would have
11 received all of the supporting documents from the KFTC when it
12 received the resolution itself, or before it received the
13 resolution.

14 THE COURT: In other words, the resolution cites to
15 source material for the conclusions that are set forth in the
16 resolution.

17 MR. COHEN: Correct, and those material would be --

18 THE COURT: And that in addition to receiving a copy
19 of the resolution, NCA would have received copies of the
20 source material as well.

21 MR. COHEN: Yes, your Honor.

22 THE COURT: Mr. Fornaciari?

23 MR. FORNACIARI: I don't know if that's true or not,
24 your Honor. I haven't checked that.

25 THE COURT: Well, that's something that I guess --

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1 MR. FORNACIARI: I can check that, but I don't know
2 what language that would have.

3 THE COURT: Well, the language barrier is a
4 significant problem, but it's a problem for both sides, and it
5 does seem to me that the defendant has the obligation to sift
6 through the foreign language documents and try to understand
7 what they say and what the source materials are and to do its
8 own investigation about what may or may not be correct and
9 what they can provide information about with respect to the
10 meetings that are disclosed where NCA is supposed to have been
11 an attendee.

12 MR. COHEN: One more point.
13 I've been told that as a party, NCA would receive
14 report of examination from the KFTC along with all the
15 documents.

16 THE COURT: A report of examination, what do you
17 mean?

18 MR. COHEN: Before the resolution is issued, they
19 send out to the parties a report of examination.

20 THE COURT: What does that mean? A report of
21 examination of what?

22 MR. SPECKS: I can respond.

23 It's basically a compilation of the evidence that
24 supposedly the KFTC has against the respondent and they are
25 then given an opportunity to respond to it. Then the

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1 resolution is issued.

2 THE COURT: I see. As a precursor to the final
3 resolution, there's a disclosure of evidence.

4 MR. COHEN: And an opportunity for NCA to respond.

5 THE COURT: And an opportunity to respond.

6 You apparently were not involved in that process. I
7 presume not.

8 MR. FORNACIARI: No, it was all in Korean. They had
9 Korean lawyers.

10 THE COURT: They would not have come to you for
11 that, I suppose. But I don't think that puts that beyond the
12 scope of preparation and of discovery here.

13 All right. Is there anything else?

14 MR. COHEN: No, sir, your Honor.

15 THE COURT: Thank you, very much.

16 MR. SEDRAN: Thank you.

17 MR. COHEN: Thank you.

18 THE COURT: I have another conference scheduled in
19 the broader case already.

20 MR. KAPLAN: Do you have a date for the other
21 conference? Oh, on a different day.

22 THE COURT: Yes, on a different day. I mean I've
23 already scheduled other proceedings.

24 (Time noted: 4:48 p.m.)
25

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